Supreme Court, U.S.
FILED
JAN 31 1996

No. 95-938

In the Supreme Court of the United States

OCTOBER TERM, 1995

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

YUEH-SHAIO YANG

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-938

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

YUEH-SHAIO YANG

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

Respondent offers no answer to our analysis (Pet. 10-13) of the text and history of 8 U.S.C. 1251(a)(1)(H). Nor does he challenge our submission (Pet. 12-13) that Congress intended that provision to confer broad discretion on the Attorney General, and to enable her to establish uniform standards for waivers of deportation for resident aliens who committed fraud in connection with their initial entry into the United States. Indeed, respondent does not even mention the Seventh Circuit's decision in *Rodriguez-Barajas* v. *INS*, 992 F.2d 94 (1993), which confirmed the breadth of the Attorney General's discretion under Section 1251(a)(1)(H) and the narrow role of the courts in reviewing its exercise, and which conflicts directly

with the Ninth Circuit's decisions in this and similar cases. See Pet. 17-18. Instead, respondent suggests only two narrow grounds for denying review in this case. Neither of respondent's arguments is persuasive.

1. Respondent defends (Br. in Opp. 2-3) the court of appeals' determination that all his acts of immigration fraud were "inextricably tied into securing his own entry into the United States" (*id.* at 2). On that basis, he maintains (*id.* at 5) that the court was justified in forbidding the Attorney General to consider any of those acts in deciding whether or not to waive his deportation. As the petition points out (at 17), however, Congress has committed decisions concerning whether and how to distinguish "prior" or "subsequent" acts of immigration fraud from those committed directly in connection with an alien's initial entry, like the decision whether or not to take the initial-entry fraud itself into account in considering waiver applications, to "the discretion of the Attorney General." 8 U.S.C. 1251(a)(1)(H). The role of a reviewing court is not to make such judgments de novo, but merely to "polic[e] the boundaries of the statutory delegation" of discretion to the Attorney General. *Rodriguez-Barajas*, 992 F.2d at 96. In reviewing the Board of Immigration Appeals' reasonable exercise of that discretion in this and a number of similar cases, the Ninth Circuit has substantially overstepped the proper limits of its own role. In so doing, it has placed itself in conflict with decisions of two other courts of appeals—*Rodriguez-Barajas*, *supra*, and *Liwanag* v. *INS*, 872 F.2d 685 (5th Cir. 1989). See Pet. 17-19. This Court's review is necessary to eliminate that circuit conflict, and to halt the continuing pattern of Ninth Circuit decisions

that have improperly restricted the scope of the discretionary authority conferred upon the Attorney General by the Immigration and Nationality Act. See Pet. 22-23.

2. Respondent restates (Br. in Opp. 3-4) the facts of the related Ninth Circuit decisions identified by the petition, and he argues that the immigration fraud at issue in his case is not particularly serious because "there is no evidence in the administrative record to show that [respondent] tried to use his immigration status to petition for anyone else's permanent residence" (*id.* at 4). Respondent's conduct was, to the contrary, bound up from the beginning with the fraudulent entry of other members of his family.* In any event, respondent's attempt to distinguish his case from some others in the same line of authority, and from the conflicting decision in *Liwanag* (see Br. in Opp. 5), on that basis is irrelevant to our argument that the Ninth Circuit has made the same fundamental error in each case: substituting its own discretion for that of the Attorney General. Compare *Liwanag*, 872 F.2d at 688. Moreover, the Ninth

---

* The Board of Immigration Appeals took into account, among other fraudulent acts, respondent's participation in two sham divorces designed first to help his wife to gain her own entry into the United States, and then to help her conceal her original fraud and to resume her true identity, once she had discovered other means to maintain her status as a permanent resident. See Pet. 5-6, 8; Pet. App. 10a. It is also disingenuous, on the facts of this case, for respondent to attempt (Br. in Opp. 5) to dissociate himself from his wife's petitions for resident status for their children (which were based, like her petition on behalf of respondent himself, on the fraudulent claim to U.S. citizenship that respondent had helped her to establish). See Pet. 5-6.

Circuit, in its most recent decision in this line (issued after we filed our certiorari petition), has specifically rejected the distinction that petitioner suggests. See *Lising* v. *INS*, No. 94-70445 (Dec. 27, 1995), slip op. 15846 ("Although one of petitioner's subsequent fraudulent acts was committed in order to obtain entry for his family, we find no basis for distinguishing this case from *Yang* and *Delmundo* [v. *INS*, 43 F.3d 436 (9th Cir. 1994).]. Indeed, the reasoning of those cases requires us to find them controlling here."). That purported distinction therefore provides no basis for this Court to deny review.

* * * * *

For the foregoing reasons, and for those stated in the petition, we respectfully submit that the petition for a writ of certiorari should be granted.

DREW S. DAYS, III
Solicitor General

JANUARY 1996